

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OTR WHEEL ENGINEERING, INC.,
BLACKSTONE/OTR, LLC, and F.B.T.
ENTERPRISES, INC., }
Plaintiffs, }
v. }
WEST WORLDWIDE SERVICES, INC.,
and SAMUEL J. WEST, individually and }
his marital community, et al., }
Defendants. }

No. CV-14-085-LRS

**ORDER DENYING
MOTION FOR
RECONSIDERATION
RE TRADE SECRET
MISAPPROPRIATION,
*INTER ALIA***

BEFORE THE COURT is “Defendants’ Motion For Reconsideration Of This Court’s Reconsideration Of Trade Secret Summary Judgment Ruling.” (ECF No. 384). This motion is heard without oral argument.

Pursuant to Fed. R. Civ. P. 60(b)(6), Defendants ask the court to reconsider its “Order Granting [Plaintiffs’] Motion For Reconsideration Re Trade Secret Misappropriation, *Inter Alia*,” (ECF No. 380), which vacated the court’s previous order (ECF No. 317) granting summary judgment on Plaintiffs’ trade secret claim and reinstated that claim for adjudication at trial.

I. PROTECTABLE TRADE SECRETS

In its order granting Plaintiffs' motion for reconsideration, the court stated as follows:

Not necessarily because it believes it committed a “clear error,”

1 but because of what it believes are “highly unusual circumstances,”
 2 the court vacates its prior ruling that Plaintiffs have failed to identify
 3 their trade secrets with sufficient particularity and will allow that issue
 4 to proceed to trial where it will be determined as a matter of law by
 5 the court at the close of Plaintiffs’ case-in-chief or by a jury at the
 6 close of the evidence.

7 (ECF No. 380 at p. 8).

8 The court now clarifies that it was not only because of “highly unusual
 9 circumstances,” but because it committed “clear error” that it vacated its summary
 10 judgment ruling as a matter of law that Plaintiffs failed to identify their trade
 11 secrets with sufficient particularity.¹ This is a permissible basis for reconsideration
 12 under Fed. R. Civ. P. 60(b) and does not require a showing by Plaintiffs that
 13 “injury and circumstances beyond [their] control . . . prevented them from
 14 proceeding in a proper fashion.” *Latshaw v. Trainer Wortham & Co.*, 452 F.3d
 15 1097, 1103 (9th Cir. 2006). Plaintiffs timely moved for reconsideration on an
 16 appropriate basis.

17 The court did not “clearly err” in reconsidering its summary judgment
 18 ruling. This reconsideration was not based on new evidence, but on evidence
 19 already in the record (e.g., Fourth Declaration of Fredrick B. Taylor, ECF No.
 20 251). Plaintiffs have produced sufficient evidence raising a genuine issue of
 21 material fact that they have identifiable trade secrets consisting of the specific
 22 instructions on how to prepare and manufacture the *Outrigger* tires that were
 23 provided to its manufacturer, Superhawk, and that these tires are the result of a
 24 unique layout of steel and nylon reinforcing materials, and a phased method of
 25 construction using specific types of rubber. (Fourth Declaration of Fredrick B.
 26

27 ¹ The court’s order did make it clear that it found it committed “clear error”
 28 in concluding as a matter of law that Plaintiffs failed to reasonably protect any
 trade secrets. (ECF No. 380 at p. 8).

**ORDER DENYING MOTION
FOR RECONSIDERATION- 2**

Taylor, ECF No. 251 at Paragraphs 14, 16, 20, 21 and 32).

The fact that Plaintiffs have not produced the actual written instructions is not dispositive of the question of whether Plaintiffs have identifiable trade secrets and does not allow the court to rule as a matter of law that Plaintiffs do not have identifiable trade secrets, those being “information, including a formula, pattern, compilation, program, device, method technique, or process, that [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use[.]” RCW 19.108.010(4)(a).² In his declaration, Taylor states that he “gave to Solideal the building specifications that OTR and STA [Specialty Tire of America] had developed together [and] [t]o my knowledge Solideal turned this teaching into technical drawings, build instructions, green tire specifications and finish tire specifications that it uses to build Outrigger tires.” (ECF No. 251 at Paragraph 36). As this court previously noted, there is evidence in the record that Solideal communicated build specifications to tire manufacturers in China. (ECF No. 380 at p. 3). And there is the evidence of Defendants’ interactions with Alliance Tire Group and/or Michael Zhang which arguably suggest Defendants recognized the “independent economic value” of Plaintiffs’ tire technology. (ECF No. 312 at p. 12).

All of this evidence gives rise to a reasonable inference that Plaintiffs' build specifications- although not produced in written form by Plaintiffs or Solideal-

² The requirement of “novelty and uniqueness” is inherent in this definition.

Machen, Inc. v. Aircraft Design, Inc., 65 Wn.App. 319, 327, 828 P.2d 73 (1992), overruled on other grounds, *Waterjet Technology, Inc. v. Flow Intern. Corp.*, 140 Wn.2d 313, 323, 996 P.2d 598 (2000).

**ORDER DENYING MOTION
FOR RECONSIDERATION- 3**

1 constitute trade secret information. As in *Forro Precision, Inc. v. International*
 2 *Business Machines Corp.*, 673 F.2d 1045, 1056-57 (9th Cir. 1982), it will be
 3 Plaintiff's burden at trial to prove this by a preponderance of the evidence to the
 4 satisfaction of a jury.³ A jury will determine if Plaintiffs have described "the
 5 subject matter of the trade secret with sufficient particularity to separate it from
 6 matters of general knowledge in the trade or of special knowledge of those persons
 7 . . . skilled in the trade." *Imax Corp. v. Cinema Technologies, Inc.*, 152 F.3d 1161,
 8 1164-65 (1998), quoting *Universal Analytics v. MacNeal-Schwendler Corp.*, 707
 9 F.Supp. 1170, 1177 (C.D. Cal. 1989), *aff'd*, 914 F.2d 1256 (9th Cir. 1990). In
 10 making this determination, the jury will hear Defendants' arguments regarding
 11 specificity and take into account the absence of actual written building
 12 instructions.⁴ The jury will decide if the building specifications testified to by
 13
 14

15 ³ Defendants assert that in *Forro*, "there was no dispute about the seminal
 16 question here- did the plaintiff actually own any trade secrets?" (ECF No. 386 at
 17 p. 6). There was such a dispute in *Forro* because the judge instructed the jury that
 18 IBM must prove "the drawings allegedly used by Forro constituted trade secret
 19 information and were so treated by IBM," 673 F.2d at 1056, and the Ninth Circuit
 20 found that "IBM introduced sufficient evidence to allow the jury to identify the
 21 secrets claimed to be misappropriated." *Id.* at 1057.

22 ⁴ Of course, the court will not allow a "trial by ambush" whereby Plaintiffs
 23 present for the first time at trial, trade secret evidence which should have been
 24 disclosed during discovery. As is typical in jury trials, the court anticipates that at

**ORDER DENYING MOTION
FOR RECONSIDERATION- 4**

1 Plaintiffs are “fictional.”⁵

2 **II. FAILURE TO PROTECT ALLEGED TRADE SECRETS**

3 As Plaintiffs point out in their response brief (ECF No. 285 at pp. 9-10), the
 4 court did not consider new evidence in concluding there is a genuine issue of
 5 material fact whether Plaintiffs made a reasonable effort to protect any trade
 6 secrets. Defendants’ reply brief offers no rebuttal on this point.

7 Defendants offered Mr. Zhang’s declaration in support of their Motion For
 8 Summary Judgment Re Trade Secret Misappropriation (ECF No. 196 at p. 7), and
 9 this court was aware from its own review of the record that there was a June 12,
 10 2007 Processing Agreement which amended the March 7, 2005 Processing
 11 Agreement. The June 12, 2007 Processing Agreement was included as part of the
 12 record in Ex. BR to ECF No. 208 (ECF No. 317 at p. 7, n. 1), but the companion
 13 June 12, 2007 “Supplementary Technology License Agreement” was not.

14
 15 the close of Plaintiffs’ case-in-chief, Defendants will make Fed. R. Civ. P. 50(a)
 16 motions for judgment as a matter of law, including one specifically directed at
 17 Plaintiffs’ trade secret claim and whether there is enough evidence to allow the
 18 jury to consider that claim.

20 ⁵ Thus far, the court has no basis for concluding that Plaintiffs have
 21 destroyed or deliberately withheld written building specifications. Therefore, there
 22 is no basis for presuming that such evidence does not exist now or did not exist at
 23 one time. *Burgin v. Universal Credit Co.*, 2 Wn. 2d 364, 384, 98 P.2d 291 (1940),
 24 a very old case that did involve a trade secret claim, is not persuasive. Plaintiffs’
 25 evidence raises a genuine issue of material fact that building specifications exist.

**ORDER DENYING MOTION
 FOR RECONSIDERATION- 5**

1 Plaintiffs appropriately made it part of the record when they filed their motion for
2 reconsideration so that the court could rule on a complete record.

3 **III. CONCLUSION**

4 This court did not commit “clear error” in granting Plaintiffs’ Motion For
5 Reconsideration Re Trade Secret Misappropriation and reinstating Plaintiffs’ trade
6 secret claim. “Defendants’ Motion For Reconsideration Of This Court’s
7 Reconsideration Of Trade Secret Summary Judgment Ruling,” (ECF No. 384), is
8 **DENIED**.

9 Because the trade secrets claim has been reinstated, it is necessary to set
10 deadlines for filing of amended exhibit and witness lists, objections to newly listed
11 exhibits, new designations of deposition testimony, and objections to those
12 designations. Amended exhibit and witness lists and new deposition designations
13 shall be served and filed no later **April 18, 2016**. Any new deposition counter-
14 designations shall be served and filed no later than **April 25, 2016**. Objections to
15 newly listed exhibits shall be served and filed no later than **May 2, 2016**.
16 Objections to new deposition designations and new counter-designations shall be
17 served and filed no later than **May 9, 2016**. An amended joint proposed pre-trial
18 order shall be served and filed no later than **May 16, 2016**. Copies of newly listed
19 exhibits not previously provided to the court, shall be provided no later than **May**
20 **16, 2016**.

21 **IT IS SO ORDERED.** The District Executive is directed to forward copies
22 of this order to counsel of record.

23 **DATED** this 21st of March, 2016.

24 *s/Lonny R. Suko*

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 LONNY R. SUKO
26 SENIOR UNITED STATES DISTRICT JUDGE
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